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IN THE

SUPREME COURT OF THE

UNITED STATES

October Term, 1971

No. ~~1839~~ 70-294

THE CITY OF LOS ANGELES,
a municipal corporation,

Petitioner,

vs.

SHELL OIL COMPANY,
a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

ROGER ARNEBERGH,
City Attorney,
JAMES A. DOHERTY,
Assistant City Attorney,
THOMAS C. BONAVENTURA,
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LAWRENCE M. REMES,
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Attorneys for Petitioner,
The City of Los Angeles.

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PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES SUPREME COURT

The petitioner, The City of Los Angeles, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of California entered in these proceedings on February 22, 1971.

OPINION BELOW

The opinion of the California Supreme Court rendered on petitioner's appeal is reported in 4 Cal. 3rd 108. A copy of the opinion is attached to this petition as Exhibit "A" of the Appendix to the petition.

JURISDICTION TO REVIEW

The opinion of the Supreme Court of the State of California was filed and entered on February 22, 1971. On March 9, 1971 petitioner filed its Petition for Rehearing which was denied on March 26, 1971. This petition for certiorari was filed less than 90 days from March 26, 1971. The jurisdiction of this Court is invoked under Title 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Does the California Supreme Court's holding that a local government must look beyond the contacts and interests of the taxpayer with the taxing jurisdiction in determining the measure of its tax conflict with the United States Supreme Court's holdings in

General Motors Corp. v. Washington (1964), 377 U.S. 436, 449, 12 L.Ed.2d 430, 84 S. Ct. 1564, and Norton Co. v. Department of Revenue (1951), 340 U.S. 534, 95 L.Ed. 517, 71 S. Ct. 377?

2. Where the trial court has found that the taxpayer's contacts and interests with the City of Los Angeles, relative to selling activities which generated gross receipts used to measure its tax, were substantial enough to justify a tax measured by 100% of those gross receipts, does the California Supreme Court's holding that the City must apportion its tax to reflect extraterritorial activities of the taxpayer, which contributed to the tax measure, violate the City's right to due process of law under the Fourteenth Amendment of the United States Constitution?

CONSTITUTIONAL PROVISIONS INVOLVED

1. Constitution of the United States, Amendment Fourteen:

> "No State shall . . . deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

STATEMENT OF THE CASE

The City, under its business license tax ordinance, taxed Shell Oil Company's Los Angeles business activities, not its sales, and measured this tax by gross receipts which were, indisputably, tied to those business activities. Shell maintained extensive contacts and interests with Los Angeles, and the City measured its tax by 100% of Shell's gross receipts from wholesale sales toward which end its business activities in Los Angeles were directed. Extraterritorial activities also contributed to producing gross receipts, but the record contains no evidence that any other jurisdiction taxed gross receipts from wholesale sales.

The Superior Court's Findings of Fact (C. T. pp. 38, 39) state that Shell maintained a district office in the City of Los Angeles which assisted in locating new station sites and acted as a servicing agent. It also maintained a division office at 1008 West Sixth Street, Los Angeles, known as the Los Angeles Marketing Division of Shell Oil Company from which it exercised executive, budgeting, supervisory, and administrative control over the Los Angeles district office as well as other area district offices. The operations, treasury, and sales departments of the Marketing division were, in turn, broken down into various sub-departments which performed various functions all of which contributed to the receipts from wholesale sales to out-of-city

customers. Other departments located at the division headquarters, which were not part of the Marketing Division organization, also performed functions in cooperation with Marketing which contributed to the production of such receipts.

With respect to the Bulk Terminal sales, the following sales activities normally took place within the City of Los Angeles:

1. The activities at the Sixth Street Division Office in the City of Los Angeles were designed, at least in so far as the marketing division was concerned, to promote, stimulate or otherwise encourage the sale of Shell's goods or merchandise.

2. The bulk plant located in the City of Los Angeles had the merchandise for delivery to the Shell dealer.

3. The Shell dealer (except possibly for his first few orders) called the bulk plant in the City of Los Angeles on the telephone and placed his order there. He reversed the charges so that Shell paid for these calls when they were long distance calls.

4. The bulk plant in the City of Los Angeles processed the orders called in on the telephone.

5. The bulk plant in the City of Los Angeles approved or accepted the orders received.

6. The Sixth Street Division Office in the City of Los Angeles billed the dealer for the merchandise sold.

7. The Sixth Street Division Office received and collected the receipts resulting from the sale. In those instances where the Shell dealer was on a C.O.D. basis the tank truck driver picked up the payments at the time of delivery..

The fundamental controlling issue at all stages of this case has been whether, in light of Shell Oil Company's extensive business activities in the City of Los Angeles, which were related to but not totally responsible for the gross receipts used to measure its tax, the City had to apportion the tax to reflect extra-territorial activities which also contributed to generating these gross receipts.

The California Supreme Court's decision on this issue is contradictory to existing federal case law in an area where it is more difficult to justify such a decision at the local level, due to the nonexistence of local commerce clauses, than it would be at the federal level.

Reasoning that,
" . . . the problems of interstate commerce apply in microcosm to the problems of intrastate or intercity commerce . . . " (Sup. Ct. 's Opinion, p.A-18) and that " . . . in spite of the absence of a specific 'commerce clause'

in the state constitution, certain other provisions of the state and federal constitutions forbid municipal taxation which, by encouraging multiple burdens through the levy of unapportioned or improperly apportioned taxes on intercity business, operates to place such business at a competitive disadvantage." (Sup. Ct.'s Opinion, p. A-18).

The California Supreme Court erroneously concluded:

> "We here determine only that if there are substantial out-of-city sales activities which directly contribute to the gross receipts sought to be made a basis of the tax, the measure of tax must apportion those gross receipts in a manner which fairly reflects the proportion of in-city to out-of-city activities." (Sup. Ct.'s Opinion, pp. A-34, n. 17). [emphasis added]).

The state constitutional grounds utilized by the California Supreme Court as a subterfuge to enable it to apply Commerce Clause concepts to intra-state municipal taxation were stretched and distorted in an effort to accomplish that purpose and do not adequately support the Court's decision. Patently, former Article XI, Sec. 11 (now Article XI, Sec. 7) of the California Constitution, which provides that, "any county, city, town or township may

make and enforce within its limits all such . . . regulations that are not in conflict with general laws;" and Article IV, Sec. 16 of the California Constitution which provides that, "a local or special statute is invalid in any case if a general statute can be made applicable.", do not support the Court's holding that the City must look beyond its own contacts and interests with the taxpayer in determining the measure of its tax.

As to the remaining state constitutional ground relied upon by the California Supreme Court in its opinion (Sup. Ct. Opinion, p. A-20 n. 8), Article 1, Sec. 21 of the California Constitution, which provides in relevant part:

> " . . . nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all other citizens."

suffice it to say that there has been no issue raised as to the City's fair and impartial application of its ordinance to all persons conducting business within its jurisdiction.

The only relevant constitutional provision relied upon by the Court in support of its conclusion is the Equal Protection Clause of the Federal Constitution (Sup. Ct. Opinion, p. A-20 n. 8), and this would have to be stretched to accommodate the argument that taxpayers conducting extraterritorial activities are deprived of equal protection of the law because they may

be subjected to multiple taxation. 1/ The record is devoid of any showing that any portion of the gross receipts used to measure Shell's tax were the measure of a tax imposed by any other jurisdiction. In General Motors Corp. v. Washington (1964), 377 U.S. 436, 449, 12 L.Ed.2d 430, 84 S. Ct. 1564, to the contrary, there was evidence that St. Louis imposed a license tax measured by sales before shipment. Nonetheless, relying upon Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 3 L.Ed.2d 421, 79 S. Ct. 357, the United States Supreme Court rejected the argument that multiple taxation barred Washington's right to measure its tax by 100% of gross receipts from sales, stating:

> ". . . in Northwestern States Portland Cement Co. v. Minnesota, supra, 358 U.S. at 463, 3 L. ed. 2d at 430, we held that '[i]n this type of case the taxpayers must show that the formula places a burden upon interstate commerce in a constitutional sense. Appellant has not done this. It has not demonstrated what definite burden, in a constitutional sense, the St. Louis tax places on the identical interstate shipments by which Washington measures its tax. Cf.

1/ This argument was rejected by the California Supreme Court in Carnation Co. v. City of Los Angeles (1966), 65 Cal. 2d 36, 40.

International Harvester Co. v. Evatt, 329 U.S. 416, 421, 423, 91 L.Ed. 390, 394, 395, 67 S. Ct. 444 (1947). And further, it has not been shown that Oregon levies any tax on appellant's activity bearing on Washington sales. In such cases we have refrained from passing on the question of "multiple taxation", e.g., Northwestern States Portland Cement Co. v. Minnesota, supra, and we adhere to that position.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Is In Direct Conflict With the Decisions of the United States Supreme Court in General Motors Corp. v. Washington and Norton Co. v. Department of Revenue.

The California Supreme Court, below, held:

> "We here determine only that if there are substantial out-of-city sales activities which directly contribute to the gross receipts sought to be made a basis of the tax, the measure of tax must apportion those gross receipts in a manner which

fairly reflects the proportion of in-city to out-of-city activities." (Sup. Ct. Opinion, pp. A-34, n. 17) [emphasis added]).

This statement represents the total significance of the Shell case and is a catastrophic departure from existing law.

In General Motors Corp. v. Washington, supra, the most recent United States Supreme Court pronouncement on the factual pattern presented by the case at bar, the Court held that a tax on the privilege of engaging in the business of selling measured by 100% of the gross receipts from sales, where substantial selling activities relative to those sales occurred within and without the taxing jurisdiction, was constitutionally valid in that it was levied on the incident of a substantial local business in the taxing jurisdiction.

"The question", said the Court, "is whether the State has exerted its power in proper proportion to appellant's activities within the State and to appellant's consequent enjoyment of the opportunities and protections which the state has afforded. Where, as in the instant case, the taxing state is not the domiciliary state, we look to the taxpayer's business activities within the state, i.e., the local incidents, to determine if the gross receipts from the sales therein may be fairly

related to those activities." (emphasis added).

There is no gainsaying the point that the United States Supreme Court concerned itself solely with whether General Motors' contacts and interests with the taxing jurisdiction, relative to selling activities which generated the gross receipts used to measure the tax, were substantial enough to justify a tax on 100% of those gross receipts. The Court espoused this position in the light of substantial extra-territorial elements which contributed to the production of the gross receipts, to wit: manufacture of the products sold outside the taxing jurisdiction; administration and promotion of sales activity from outside the taxing jurisdiction; supervision of the capital structure and financing of the dealers from outside the taxing jurisdiction; responsibility for the adequacy of dealer services to customers from outside the taxing jurisdiction; and warehousing and shipment of parts from outside the taxing jurisdiction.

The position of the General Motors Court was a logical outgrowth of its decision, fourteen years earlier, in Norton Co. v. Department of Revenue (1951), 340 U.S. 534, 95 L. Ed. 517, 71 S. Ct. 377, wherein the Court upheld an occupation tax measured by unapportioned gross receipts from retail sales upon the business activity of receiving and forwarding orders to an out-of-state manufacturer; accepting delivery of the products, in many but not all cases, in carload lots; and

reconsigning separate orders in their original packages to customers. Norton involved substantial out-of-state contacts, including manufacturing outside the taxing jurisdiction; maintenance outside the taxing jurisdiction of general management, accounting, and credit offices, which performed activities relative to the sales; and the acceptance or rejection of all orders outside the taxing jurisdiction. However, in Norton as in General Motors, the United States Supreme Court looked only to the contacts and interests of the taxpayer within the taxing jurisdiction relative to the subject gross receipts in determining the validity of the tax.

The business activities of Shell Oil Company in the City of Los Angeles, as set forth, supra, had at least as much impact on sales generating gross receipts used to measure Shell's tax as did the local business activities of General Motors Corp. and Norton Co. on sales generating gross receipts in those cases. Defendants below did not deny this but dredged up the sophistry that General Motors and Norton apply only to sales taking place inside the territorial limits of the taxing jurisdiction. This argument is completely misleading, because the tax in the instant case, as in General Motors, 377 U.S. at 438, and Norton, 340 U.S. at 535, is imposed upon the privilege of engaging in business activities and not upon sales. Consequently, in the context of the issue before this Court, the "place at which the sale takes place", whatever this phrase

means, 2/ is only relevant to the extent that it constitutes a business activity. (American Manufacturing Co. v. St. Louis (1919), 250 U.S. 459, 63 L.Ed. 1084, 39 S. Ct. 522.)

2. The Decision Below Violates the City's Right to Due Process of Law and in So Doing Opens the Floodgates to Fraudulent Tax Reporting, Progagates Uncertainty, and Reduces Municipal Power to Tax While it Increases the Cost of Tax Enforcement

No United States Supreme Court or California Supreme Court case has ever before held that a municipality imposing a privilege tax measured by gross receipts must look beyond its own contacts and interests with the taxpayer when measuring its tax. This holding by the California Supreme Court, below, divests the City of Los Angeles of its right to

2/ In Norton Co. v. Department of Revenue, 340 U.S. at 535, title to most of the goods sold in connection with Norton's taxable business activity passed outside the taxing jurisdiction.

tax without due process of law. 3/ It is unreasonable to permit a multi-city business to escape paying its fair share of local taxes, commensurate with the extent and nature of its activities in the taxing jurisdiction, solely because it conducts business activities outside the taxing jurisdiction. The trial court found that Shell's business activities in the City of Los Angeles were substantial enough to justify a tax based on 100% of gross receipts from sales toward which end said business activities were directed (C. T. p. 81). The California Supreme Court's decision in the case at bar will require Los Angeles and every municipality in the State of California, which employs gross receipts as a tax measure, to apportion its tax where the taxpayer conducts

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3/ In Township of Riverdale v. Town of Orangetown (1968), 403 F. 2d. 684, 686, the court held: "We hold that a municipal corporation like any other corporation is a 'person' within the meaning of the Fourteen Amendment and is entitled to its protection." It is to be noted that the City of Los Angeles is a charter city, created by authority of former (Article 11, Sections 6 and 8, of the California Constitution (incorporated in 1970 into Article 11, Sections 3 and 5), and is neither a creature of the State nor subject to control by the State with respect to purely municipal affairs of which taxation is one. Ex Parte Braun (1903), 141 Cal. 204; City of Glendale v. Tronsden (1957), 48 Cal. 2d 93, 99.

"substantial" business activities outside the taxing jurisdiction regardless of the nature and extent of the taxpayer's business activities within the taxing jurisdiction.

This departure from what appeared to be the established law under General Motors Corp. v. Washington, supra, and Norton Co. v. Department of Revenue, supra, would, if permitted to stand, have a jarring effect upon municipal taxation. As most city business taxes are, perforce, self-reporting, the cities would be placed at the mercy of the taxpayers' judgment as to what constitutes an appropriate apportionment formula. Few, if any, cities could afford the extensive enforcement procedures which would be necessary to prevent grossly fraudulent reporting. State tax returns would be useless as a guideline to determining amounts owed. Every taxpayer who reported apportioning gross receipts would have to be audited. Each auditor would then have to devise an apportionment formula based upon the facts confronting him. There would be an inevitable increase in administrative hearings required to settle differences between auditors and taxpayers, and the City's ability to achieve uniform application of the tax would be diminished. The result of this erroneous decision would be to simultaneously divest municipalities of taxing power and increase the cost of tax enforcement.

CONCLUSION

No case has, heretofore, held that a municipality imposing a privilege tax measured by gross receipts must consider business activity occurring in other jurisdictions in determining the measure of its tax. The United States Supreme Court has specifically held to the contrary in General Motors Corp. v. Washington, supra, and in Norton Company v. Department of Revenue, supra, wherein the contacts and interests of the taxing jurisdiction with the business activity subject to tax were deemed the only relevant considerations in determining the sufficiency of the tax measure. The Los Angeles business activities of Shell in the instant case are as substantial and as related to the gross receipts utilized by the City to measure its tax as were the Washington business activities of General Motors and the Illinois business activities of Norton Company. It is difficult to conceive of a decision which could result in a more significant attenuation of municipal power to tax nor one fraught with more chaotic implications relative to tax enforcement than the decision below. Consequently, it is respectfully requested that a writ

of certiorari issue to review the judgment and opinion of the Supreme Court of the State of California.

Respectfully submitted,

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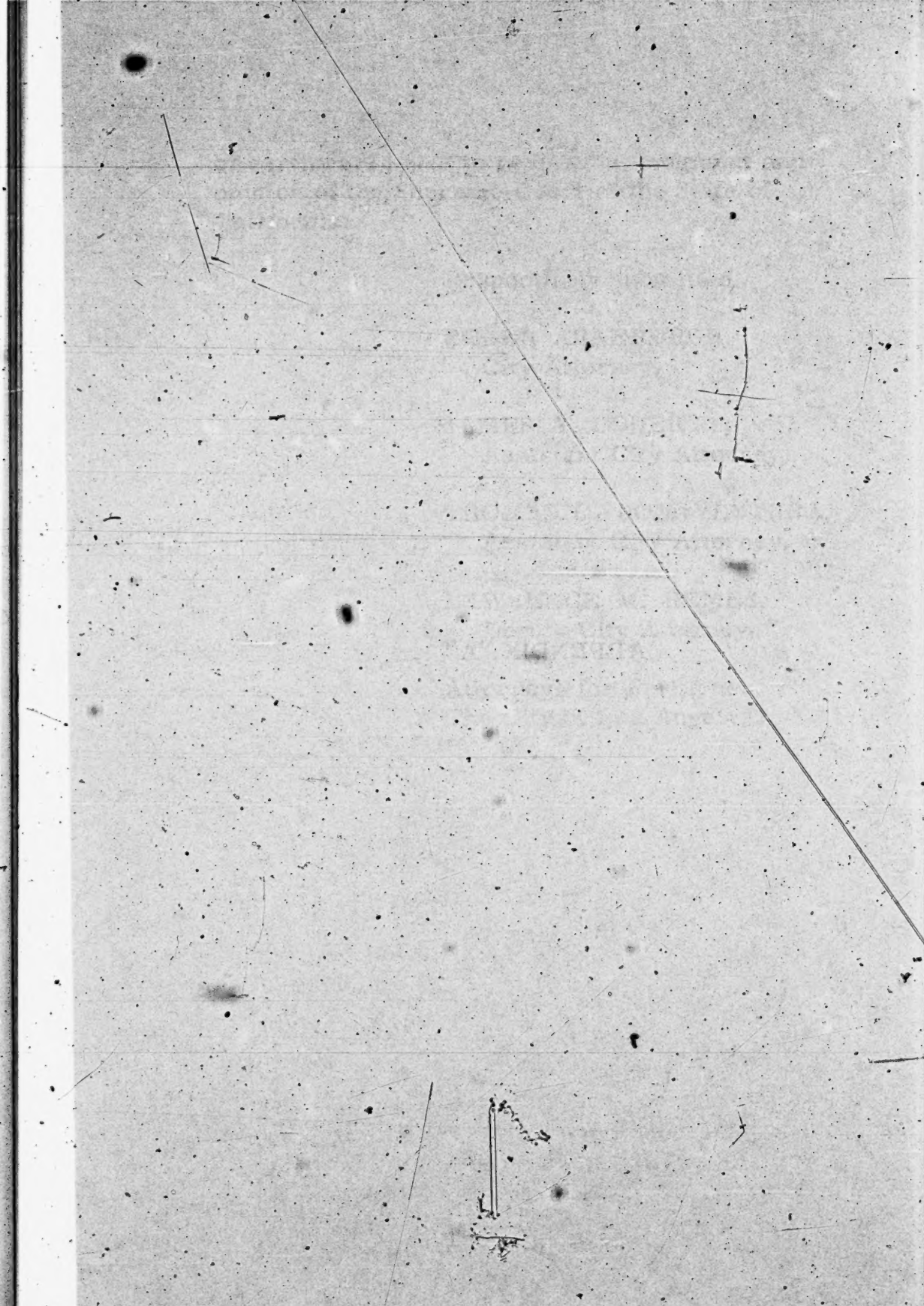

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

CITY OF LOS ANGELES,

Plaintiff and Respondent,

v.

SHELL OIL COMPANY,

Defendant and Appellant.

L. A. 29670

Defendant Shell Oil Company (Shell) appeals from a judgment, entered after a non-jury trial, awarding plaintiff City of Los Angeles (the City) the sum of $57,103.27 as a deficiency of business license taxes levied against Shell by the City for the years 1958-1961.

Shell is a large oil company which operates throughout the United States. Its headquarters are in New York, and its marketing activities are carried on through a network of regional, division, and district offices.

Among the facilities maintained by Shell in Los Angeles are a "division office" and a "bulk terminal."

SEE CONCURRING OPINION

The division office is a general sales and marketing headquarters subordinate in the company hierarchy to the San Francisco "regional office" and superior to the various "district offices" located within the division - which includes areas outside the City itself. The bulk terminal is essentially a storage depot which is fed by pipeline from the out-of-city Wilmington refinery.

Among the functions of the division office is that of supervising wholesale sales of gasoline to retail service stations located in the districts which comprise the division. The gasoline so sold is delivered to the customer either directly from the Wilmington refinery or by truck from the Los Angeles bulk terminal. Deliveries of each kind are made to both in-city and out-of-city customers. [1]

Pursuant to the Los Angeles Municipal Code (hereafter L.A.M.C.) the City levied an assessment against Shell for unpaid business license taxes for the years 1958-1961.

1. A description of the function of the district office in the sales operation will be set forth infra.

inclusive. After administrative hearings Shell paid a portion of the assessment and agreed to the validity of certain other portions of the City's claim relating to deliveries made to in-city customers. Remaining in controversy were, generally speaking, those portions of the alleged deficiency relating to both refinery and bulk terminal deliveries to out-to-city customers. When the Los Angeles Board of Review upheld the City's position on these matters, and Shell refused to pay the deficiency, the City commenced the present action. Judgment was entered in favor of the City, and this appeal followed.

Shell on this appeal no longer resists that portion of the alleged deficiency relating to sales of gasoline delivered from the Wilmington refinery directly to out-of-city wholesale and retail customers. Thus the only part of the assessment remaining in controversy is that relating to wholesale sales of gasoline delivered from Shell's in-city bulk terminal to retailers outside the City. The City seeks to base the tax upon Shell's total gross receipts from such sales; Shell contends that the tax can be based only upon that portion of such gross receipts attributable to its selling activities within the City.

I

Preliminarily we set forth certain provisions of the Los Angeles Municipal Code applicable to the assessment here involved and a tax ruling of the City interpreting them. We

also refer to pertinent decisions of this court relating to the code provisions.

L. A. M. C. section 21.03, subdivision (a), provided: "(a) Subject to the provisions of this Article, a business tax registration certificate must be obtained and a business tax must be paid by every person engaged in any of the businesses or occupations specified in Sections 21.50 to 21,198, inclusive, of this Article; and a business tax is hereby imposed in the amount prescribed in the applicable section. No person shall engage in any business or occupation subject to tax under the provisions of this Article without obtaining a registration certificate and paying the tax required thereunder."

L. A. M. C. section 21.166 provided: "(a) Every person manufacturing and selling any goods, wares or merchandise at wholesale, or selling any goods, wares or merchandise at wholesale, and not otherwise specifically taxed by other provisions of this Article, [2] shall pay for each calendar year or portion thereof the sum of $8.00 for the first $20,000 or less of gross receipts, and, in addition thereto, the sum of 40 cents per year for each additional $1,000 of gross receipts or fractional

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2. Apparently section 21.166 is a "catch-all" provision. Other sections of the article are directed to specific kinds of businesses. (See City of Los Angeles v. Belridge Oil Co. (1954) 42 Cal. 2d 823, 828.)

part thereof in excess of $20,000; . . . (b) For the purpose of this section, a wholesale sale or sale at wholesale means a sale of goods, wares or merchandise for the purpose of resale in the regular course of business." (Italics added.) Effective January 1, 1960, the rate of tax was increased.

In 1954 and 1957 this court held in the Belridge cases (City of Los Angeles v. Belridge Oil Co. (1954) 42 Cal. 2d 823, and (1957) 48 Cal. 2d 320) that although the City could constitutionally measure its business tax as to persons engaged in "selling" by reference to gross receipts arising from transactions having certain "extraterritorial elements," only those gross receipts which were "directly attributable" to selling activities within the City could constitutionally be utilized for this purpose.

In those cases the products sold never entered the territorial limits of the City, but the main office of the defendant company was located in Los Angeles and substantial elements of its sales activity took place there. (See 42 Cal. 2d at pp. 825-826) It was argued on the first appeal that the City could not constitutionally base its business tax upon the gross receipts of the company because to do so would be to impose a tax on business carried on outside the City, but we concluded that the tax was based on the activity of "selling" within the City and that there was "no [constitutional] objection to basing the rate of such tax on the gross receipts attributable to such

selling activities, even though various extra-territorial events contribute to such gross receipts." (42 Cal. 2d at p. 831.)

However, we went on to express an important corollary to this principle: "[E]ven though the city can tax the activity of selling it can only base the tax on such selling activities as are carried out within its territorial limits. For this reason it is only those gross receipts which are attributable to selling activities within the city which should form the basis for the rate of tax. Gross receipts attributable to selling activities conducted outside the city, should not be included." (42 Cal. 2d at pp. 831-832.) We pointed out that if the tax were to be based upon gross receipts attributable to selling activities outside the city, "it would unjustly discriminate against those firms whose selling activities in Los Angeles compose but a small fraction of the total sales effort and whose gross receipts are in large part attributable to selling activities in other areas." (42 Cal. 2d at p. 832.) Thus, we concluded, "a just and reasonable construction [of the L. A. M. C. sections in question] requires that the measure of the tax be limited to those gross receipts attributable to selling activities within the City of Los Angeles." (42 Cal. 2d at p. 833.)

On retrial the parties in Belridge were confronted with the problem of determining which of the company's gross receipts were in fact "attributable" to in-city selling activities within the meaning of our opinion. That the

parties found this task a difficult one is manifested by the fact that they finally entered into a stipulation providing in substance that all of the defendant company's gross receipts were attributable "in part" to its selling activities within the City and "in part" to its selling activities without the City, but that not more than 20 percent of its gross receipts were attributable to the defendant's selling activities within the City "under any method of allocation which is fairly calculated to determine the defendant's gross receipts derived from or attributable to sources within the city . . . and to determine the defendant's gross receipts derived from or attributable to sources outside the City . . . ." (City of Los Angeles v. Belridge Oil Co., supra, 48 Cal. 2d 320, 321.) The stipulation also reserved the City's right to maintain on appeal "that there should be no allocation of receipts . . . and that the tax should be measured by defendant's total gross receipts." (48 Cal. 2d at p. 322.) The trial court held in essence that the matter of "attribution" should be determined under a "fair" method of allocation such as that reflected in the stipulation of the parties and that therefore the tax should be based on 20 percent of total gross receipts.

On appeal the City pressed the argument which it had reserved in the stipulation, to wit, that the first Belridge decision did not require an allocation of defendant's gross receipts but permitted taxation based on total gross receipts. In our opinion we pointed out that this argument misinterpreted the principle of the first

Belridge decision by failing to give sufficient consideration to that aspect of the principle represented by what we have termed the "corollary" thereto. In essence we reiterated that although a tax upon a "selling" business may be measured by reference to gross receipts derived from transactions having "extraterritorial elements," only those gross receipts "attributable" to in-city selling activities could be considered. We concluded: "Having heretofore held that only that portion of the gross receipts directly [3] attributable to defendant's selling activities carried on in the city of Los Angeles may be taxed under section 21.166, and the parties having stipulated that by a method of allocation 'fairly calculated to determine the defendant's gross receipts' 20 per cent thereof was derived from selling activities in the city of Los Angeles, we conclude that the trial court was correct in applying the tax formula to 20 per cent of defendant's gross receipts." (48 Cal.2d at p. 324.)

Following the Belridge decisions the city clerk, pursuant to authority granted him in the municipal code, [4] adopted Ruling 14. Part I

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3. The adverb "directly" was added to the standard in the second Belridge decision.

4. L.A.M.C. section 21.15, subdivision (h), provides in relevant part: "When, by reason of the provisions of the Constitution of the United States or the Constitution of California, the business tax imposed by this Article cannot

(continued)

of the Ruling, which set forth substantive guidelines for the determination of "direct attribution" within the meaning of the Belridge cases, will be discussed below. Part II of the Ruling undertakes to give reasons why the adopted guidelines had been considered necessary or appropriate. Here it was stated that the Ruling was promulgated by reason of the Belridge decisions, "which have made it necessary to devise a method by which the measure of the tax imposed upon persons who are engaged in certain taxable businesses both within and outside of the City of Los Angeles can be determined." It is also explained that the formula prescribed in the Ruling was selected with a view toward providing a simple means of apportionment which would eliminate difficulties such as assigning weight to various factors and maintaining the kind of records necessary to the application of more complex formulae.

The keynote of the substantive portion of the Ruling is struck in the first paragraph of

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4. Continued:

be enforced without there being an apportionment according to the amount of business done in the City of Los Angeles, or in the State of California, as the case may be, the City Clerk may make such rules and regulations for the apportionment of the tax as are necessary or desirable to overcome the constitutional objections." (Italics added.)

Part I: "Whenever a person is engaged within the City of Los Angeles in a business subject to a tax under Sections 21.166 or 21.167, L.A.M.C., only those gross receipts which are directly attributable to the business engaged in within the City of Los Angeles shall be included within the measure of the tax." (Italics added.) The remainder of Part I goes on to describe what gross receipts should and should not be considered "directly attributable" to local activities and to provide procedures and practices to be followed in making the determination. Two paragraphs are particularly relevant for our present purposes.

Paragraph 1(c) of the Ruling provides: "(c) If the person engaged in such business owns, leases, occupies or otherwise maintains within the City a place or premises upon which or from which he engages in such business, all receipts resulting from sales of goods, wares or merchandise which are in any manner attributable to business functions carried on, at, or from that place of business, and which goods, wares or merchandise are either sold for shipment into the City of Los Angeles to the purchaser or his agent or designee, or are shipped from a place within the City of Los Angeles to a place within the City, or from a place within the City to a place outside the City but within the State of California, shall be considered directly attributable to the business engaged in within the City." (Italics added.)

Paragraph 1(d), on the other hand, provides in substance that if such a person having

such a place of business within the City has receipts attributable "both to business activities based upon that place of business and business activities carried on outside the City of Los Angeles" 25 percent of the receipts resulting from the sale of goods which are not shipped from or into the City as provided in paragraph 1(c) shall be considered directly attributable if four or more of seven specifically listed elements of the selling process take place within the City, and 15 percent of the gross receipts so derived shall be considered directly attributable if less than four of the said elements take place within the City. The seven elements are, generally speaking: negotiating or soliciting, display of samples, processing of orders, acceptance of orders, arranging for delivery, billing and collection.[5]

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5. Paragraph 1(d) provides in full as follows:

"(d) If the person engaged in such business owns, leases, occupies or otherwise maintains within the City of Los Angeles a place or premises upon which or from which he engages in business and has receipts which are attributable both to business activities based upon that place of business and business activities carried on outside the City of Los Angeles, 25 percent of the receipts resulting from the sale of goods, wares or merchandise manufactured and sold or sold by the person which are not shipped from or into the City of Los Angeles as provided in paragraph (c) above, shall be considered directly attributable if four or more of the elements of the selling process listed below

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In the case of Carnation Co. v. City of Los Angeles (1966) 65 Cal. 2d 36, we considered one specific application of Ruling 14 in

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5. Continued:

take place within the City of Los Angeles with respect to the sales of goods, wares or merchandise which produce those receipts; if less than four of the listed elements of the selling process take place within the City, 15 percent of the gross receipts so derived shall be considered directly attributable.

"For the purpose of determining the amount of attributable gross receipts which shall be considered directly attributable for the purposes of this paragraph (d), the following elements of the selling process shall be considered:

"1. Negotiating sales of, or soliciting, receiving or taking orders for the sale of goods, wares or merchandise, and/or carrying on activities by an employee, agent, or otherwise, designed to promote, stimulate or otherwise encourage the sale of goods, wares or merchandise.

"2. Display of articles or samples of goods, wares or merchandise of line or similar kind to those offered for sale where the actual articles sold or to be sold will be delivered from a place of storage or manufacture located outside the City of Los Angeles but within the State of California.

"3. Processing of orders received or taken preparatory to their being accepted,

(continued)

the light of the Belridge decisions. In that case, "administrative and manufacturing, processing or handling facilities for all products"

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5. Continued:

where the actual acceptance occurs elsewhere.

"4. Approval or acceptance of orders received or taken.

"5. Giving an order for or arranging for delivery or shipment of articles sold or to be sold from a place of storage or manufacture located outside the City of Los Angeles but within the State of California.

"6. Billing for goods, wares or merchandise sold.

"7. Receiving or collecting receipts (as defined in subparagraph (a) in Section 21.00 resulting from sales of goods, wares or merchandise.

"It is recognized that many persons carrying on the business of selling goods, wares or merchandise will not have their functions so organized that all of the elements of the selling process listed will be present; it is further recognized that certain of the elements listed may occur simultaneously, or nearly so, with other elements in all or a portion of the transactions of sale handled by a particular person. Notwithstanding, each of the elements present shall be considered as a separate element for the purposes of the regulation.

"It shall be recognized that certain businesses are subdivided into divisions or organized along functional lines for the convenience

(continued)

whose gross receipts were in issue were located on the taxpayer Carnation's Los Angeles premises, [6] and "sales [of such products] at wholesale and retail [were] made both within and without the city limits." (65 Cal. 2d at

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5. Continued:

of administration and management and that it is to be expected in some cases that the operations of a particular division or functional unit of a taxpayer may call for the application of the 25 percent rate, and the operations of another may call for the application of the 15 percent rate. Due regard for such divisional of functional organization shall be made in administering the business tax ordinance under the provisions of this ruling."

6. The City refers us to the record and briefs in Carnation and invites us to conclude therefrom that in fact a number of the products there involved were not manufactured within the City but were only "processed and handled" there prior to sale. On this basis the City urges that our Carnation decision is of broader application than our opinion indicates. We decline this invitation to reexamine the record in Carnation and alter the scope of our holding therein. Although such a procedure does not lack weighty precedent (see Bingham v. United States (1935) 296 U.S. 211, 218-219), we believe that the interests of sound judicial administration counsel against the alteration of a final opinion of this court by such a means.

p. 38.) The City, relying on Ruling 14 (Part I, par. 1(c)), sought to base its business tax on "gross receipts from the sale of such products without regard to the place of sale if within the State of California." (65 Cal. 2d at p. 38.) Carnation contended that this was forbidden by the Belridge cases and that the tax could be based only on sales to in-city customers; the trial court agreed.

We reversed the judgment. We noted first "that it is constitutional for a city to tax the privilege of manufacturing, processing or handling goods within its boundaries, and to determine the amount of the tax on the gross receipts from sales of the goods, regardless of whether the sales are made within or without the boundaries. (American Mfg. Co. v. St. Louis, 250 U.S. 459 . . . .)" (65 Cal. 2d at p. 38.) Then, stating that the question at issue was whether the tax sought to be levied in the case before us was of this nature (i.e., a tax upon "the privilege of manufacturing, processing or handling goods"), we proceeded to explain why the Belridge cases did not compel a negative answer to that question. Belridge, we pointed out, did not involve goods manufactured in Los Angeles - and in fact none of the goods there in question ever entered the City. Thus, we reasoned, the basis for the tax upon Belridge's business privilege was constitutionally limited to the extent of its selling activities within the City, whereas in Carnation the activity of manufacturing provided contact with all subsequent sales, wherever made within the state, and provided

adequate constitutional support for the measurement of the privilege tax on the basis of all gross receipts derived from such sales. (65 Cal.2d at pp. 39-40.)

II

It is manifest that the roots of our Belridge decisions can be traced to the numerous and varied cases wherein the United States Supreme Court has insisted - on various doctrinal bases - that state taxes on interstate enterprises be fairly apportioned in order to prevent multiple tax burdens on such enterprises. Thus in cases involving state net income taxes on interstate businesses the high court, grounding its decision upon the due process clause, has struck down taxes which seek to "reach profits which are in no just sense attributable to transactions within [the taxing] jurisdiction" and therefore operate "unreasonably and arbitrarily, in attributing to [the taxing jurisdiction] a percentage of income out of all appropriate proportion to the business transacted" in that jurisdiction. (Hans Rees' Sons v. North Carolina (1931) 283 U.S. 123, 134, 135; see also, e.g., Butler Bros. v. McColgan (1942) 315 U.S. 501, 506-507.)

Similarly in cases involving state ad valorem property taxes on instrumentalities used in interstate commerce the court has required, on grounds of the due process and commerce clauses, that the tax be apportioned as to property which may be similarly taxed in other states. "Otherwise there would be multiple

taxation of interstate operations and the tax would have no relation to the opportunities, benefits, or protection which the taxing state gives those operations." (Standard Oil Co. v. Peck (1952) 342 U.S. 382, 385; see also and compare Central Railroad Co. v. Pennsylvania (1962) 370 U.S. 607.)

Again, in cases involving gross receipts taxes on interstate enterprises, the court has held that the commerce clause requires apportionment of the tax if the activities giving rise to the gross receipts occurred in more than one state. "The vice characteristic of those [gross receipts taxes] which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable, in point of substance, of being imposed . . . or added to . . . with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce." (Western Live Stock v. Bureau of Revenue (1938) 303 U.S. 250, 255-256; see also, e.g., Gwin, White & Prince, Inc. v. Henneford (1939) 305 U.S. 434; J. C. Adams Mfg. Co. v. Storen (1938) 304 U.S. 307; but see General Motors v. Washington (1964) 377 U.S. 436.)

Although the Constitution of this state, unlike that of the United States, contains no provision specifically preventing its constituent political subdivisions from enacting laws

affecting commerc e among them, there is no doubt that many of the considerations relevant to problems of interstate commerce apply in microcosm to the problems of intrastate or intercity commerce in a heavily populated state such as our own. In the words of one perceptive commentator: "The basic policy underlying the commerce clause of the Federal Constitution [art. 1, § 8, par. 3] - to preserve the free flow of commerce among the states to optimize economic benefits - is equally applicable to intercity commerce within the state. If fifty independent economic units within the United States are undesirable, 387 economic enclaves within California would be intolerable. A tax burden which places intercity commerce at a disadvantage in comparison to a wholly intracity business may have such an effect." (Sato, Municipal Occupation Taxes in California: The Authority to Levy Taxes and The Burden on Intrastate Commerce (1965) 53 Cal. L. Rev. 801, 818, fn. omitted.)

The decisions of this court in City of Los Angeles v. Belridge Oil Co., supra - as well as a number of other decisions to which we shall presently advert - represent a recognition of these manifest realities and a determination that, in spite of the absence of a specific "commerce clause" in the state Constitution, certain other provisions of the state and federal Constitutions forbid municipal taxation which, by encouraging multiple burdens through the levy of unapportioned or improperly apportioned taxes on intercity business, operates to place such businesses at a competitive disadvantage.

One of the first cases to articulate this doctrine was Ferran v. City of Palo Alta (1942) 50 Cal. App. 2d 374, a case upon which we relied in Belridge. There the city imposed a license tax on the business of laundering and taking orders for laundering - the tax being measured by "the number of employees at the plant or place of laundering." Plaintiff laundry maintained its plant, where 35 persons were employed, in San Francisco but had customers throughout the bay area, including Palo Alto, who were serviced by truck on a pick-up and delivery basis. Of a gross annual income amounting to approximately $60,000 only about $900 was derived from Palo Alto business, and plaintiff contended that the application of the license tax to it on the basis of its total number of employees was unconstitutional.

The Court of Appeal agreed. Noting that a license tax computed by the amount of business done within the city would be free from constitutional infirmity, and granting that the assessment of that amount might properly proceed by an indirect means looking to numbers of employees rather than dollar volume, the court nevertheless went on to hold the Palo Alta tax invalid as applied to plaintiff. Two separate constitutional grounds were stated. First, the court held that the tax had an improper extraterritorial application. [7] "Since

7. Article XI, section 11, of the California Constitution provides: "Any county, city, town, or township may make and enforce within its limits all such ... regulations as are not in

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the number of employees is in a general way proportionate to the amount of business done, and since in this case the total amount of business done, and since in this case the total amount of business done is about $60,000 per annum, of which only about $900 per annum comes from within Palo Alto, it follows that the license tax is non-local and operates upon business outside of Palo Alto in proportion to the difference in amounts. It is an invalid attempt by the city to make its ordinance extra-territorial in scope and application. If the method were upheld, it would be possible to subvert the entire principle of local application of municipal revenue measures." (50 Cal. App. 2d at pp. 382-383.) Second, the court held that the tax resulted in a denial of equal protection of the laws. [8] "We also hold that

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7. Continued:

conflict with general laws." (Italics added.) This provision has been held to forbid extra-territorial application of local ordinances. (South Pasadena v. Terminal Ry. Co. (1895) 109 Cal. 315, 321.)

8. The Fourteenth Amendment to the United States Constitution provides that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." The California Constitution contains no specific equal protection provision but it contains a number of provisions requiring the uniform application of laws. Article I, section 21, upon which the Ferran court appears to have

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the case is governed by the principles laid down in Buen[e]man v. Santa Barbara, supra [(1937) 8 Cal. 2d 405], [9] and related cases, and that . . . the ordinance is void as an unlaw-

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8. Continued:

placed reliance, in pertinent part provides: " . . . nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all other citizens." Article IV, section 16 provides: "A local or special statute is invalid in any case if a general statute can be made applicable." The test for determining the validity of a statute or ordinance against a claim of unlawful discrimination is substantially the same under these state prohibitions as it is under the equal protection clause. (Whittaker v. Superior Court (1968) 68 Cal. 2d 357, 367, fn. 16; County of L. A. v. Southern Cal. Tel. Co. (1948) 32 Cal. 2d 378, 389.)

9. The Bueneman case involved a flat rate license fee upon businesses which solicited orders for laundry and maintained a pick-up and delivery system within the taxing city but had their plant located outside the city. Persons operating a similar business but having their plant within the city were not subject to the tax. This court held that the tax resulted in an invalid discrimination in favor of in-city laundries and was in violation of constitutional protections insuring equal protection of the laws.

ful and unreasonable discrimination against and denial of the equal protection of the law to laundries doing their laundering and having their plants outside of Palo Alto, but deriving some of their business from within said city. It also unlawfully discriminates against those engaged in Palo Alto in the business of taking orders for laundering or washing to be done by launderies maintaining their washing plants and doing their business outside the city. The business of such solicitors may be an independent calling having no logical connection whatsoever with the number of employees at the plant where the washing is done." (50 Cal. App. 2d at p. 383.)

In Security Truck Line v. City of Monterey (1953) 117 Cal. App. 2d 441, the principles announced in Ferran were clarified.[10] There the city sought to levy a business license tax upon highway carriers who hauled fish during canning season from points outside the city to canneries within the city - the tax being measured by the unladen weight of each vehicle used for this purpose. Plaintiff carrier had its principal place of business outside the city and had neither place of business nor agents nor terminus in the city, but during the autumn and winter canning season it engaged in the hauling of sardines from points in

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10. The Security Truck Line case was not cited in either of our Belridge opinions. Ferran, as we have indicated above, was cited and relied upon in both Belridge opinions.

southern California to canneries within the city. Of plaintiff's sixty trucks no more than four were involved in fish hauls at any one time during the season, but its other commitments made it necessary to rotate the use of its trucks so that most of them were used for fish hauling at one time or another during the season; moreover, sometimes it was necessary for plaintiff to augment its own fleet of trucks by subcontracting with independent haulers who would haul fish only occasionally and sometimes only once a season. Prorated on a tonnage mile basis plaintiff's fish deliveries constituted only 1 percent of its total business, but during the season it derived 20 percent of its income from fish hauling.

The plaintiff carrier brought an action to have the tax declared unconstitutional and its enforcement enjoined. It urged that under the ordinance as applied it was required to pay a license fee as to each one of its vehicles used for fish hauling even if that particular vehicle hauled only one load of fish into the city during the season, and that, considering its necessary rotation of trucks, the ordinance would require it to license a substantial portion of its fleet plus the trucks of subcontracted haulers. Such a tax, plaintiff complained, was not reflected in the rate structure governing its compensation, and it urged that the ordinance was unconstitutional on several grounds - among them that of unlawful discrimination in violation of state and federal Constitutions. The trial court held that the ordinance was "unconstitutional in its application and wording."

(117 Cal. App. 2d at p. 449) and issued the injunction.

The Court of Appeal affirming the judgment, stated its approach to the problem in these terms: "If the tax here involved is imposed upon a taxable local event, that is, if the carrier is doing business in Monterey and if the measure of the tax is not discriminatory, then, in our opinion, the tax is valid. But if the tax is basically upon an event occurring outside the city, or, if the tax is discriminatory as to plaintiff, then it is invalid." (117 Cal. App. 2d at p. 451.) [11]

Proceeding to apply this two-step standard the court first concluded that the plaintiff's activities in Monterey were sufficient from a due process standpoint to permit a tax upon them. "[S]uch activities constitute the doing of business in Monterey, a taxable event occurred there, and that city is empowered to tax such event by a proper nondiscriminatory ordinance." (117 Cal. App. 2d at p. 452.) In reaching this conclusion the court rejected an argument of the plaintiff to the effect that any taxation of intercity carriers by particular municipalities was "unfair and unsound" on the

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11. Illustrating the application of this test by reference to previous cases, the court stated that the tax in Ferran "was void as a denial of equal protection and because of discrimination against the outside business for failure of apportionment." (117 Cal. App. 2d at p. 451.)

basis that if each community served by a carrier could tax it an unfair burden on the carrier and on intercity business would result. This argument - which apparently sought to draw an analogy to those cases decided under the federal commerce clause which forbid a tax on the privilege of engaging in interstate commerce itself (see Spector Motor Service v. O'Connor (1951) 340 U.S. 602; Puget Sound Co. v. Tax Commission (1937) 302 U.S. 90; Robbins v. Shelby Taxing District (1887) 120 U.S. 489) - was held to lack any basis in state constitutional provisions.

However, when the court turned its attention to the validity of the particular tax at bench it recognized that the argument of multiple burdens, "while it does not result in a holding of lack of power to tax, does suggest that such tax ordinances must be scrutinized carefully to see that a city measures its tax by the taxable event that occurs in the city, and does not measure in such a manner that an unfair or discriminatory burden is imposed on such carriers." (117 Cal. App. 2d at p. 453.) The tax before it, the court concluded, was measured in an invalid manner because the amount of tax was governed by a factor which had no relationship to the actual amount of business done in the taxing city. "The tax is imposed upon each truck making a delivery or deliveries during the fish hauling season. If that truck makes one hundred deliveries during the season, the maximum tax is but $13.50 for that truck. But if the carrier uses one hundred different trucks to make the one

hundred deliveries, it must pay $13.50 for each truck, or a total of $1,350. . . . The taxable event in both cases is the same - the delivery of one hundred loads of fish in Monterey - yet one company would pay one hundred times what the other had to pay. It seems clear that the measure of the tax set forth in the ordinance has no reasonable connection with that taxable event . . . . [The tax] is based upon an arbitrary standard and a purely extraneous event." (117 Cal. App. 2d at pp. 453-454.)

Finally, the court pointed out that the tax struck down in the Ferran case shared the constitutional defect which rendered the Monterey tax invalid. "In the Ferran case the tax was measured by a purely extraneous event [i.e., the number of employees at the San Francisco plant] that had no relation to the quantum or nature of the business done in Palo Alto. That is equally true in the instant case. Here, the standard selected, the number of individual trucks making deliveries, rather than the number of such deliveries or the tonnage carried into the city is a purely accidental and extraneous event that has no relation to the taxable event occurring in Monterey or the quantum of business there carried on. For these reasons, it is our opinion that the measure . . . is capricious, arbitrary and discriminatory." (117 Cal. App. 2d at p. 454.)

In City of Los Angeles v. Carson (1960) 181 Cal. App. 2d 540, City of Los Angeles v. Drake (1961) 195 Cal. App. 2d 744, and City of

Los Angeles v. California Motor Transport Co. (1961) 195 Cal. App. 2d 759, the Security Truck Line case was relied upon to hold invalid business license taxes on charter bus and motor transport businesses based upon the number of vehicles utilized. To be contrasted with these cases is Willingham Bus Lines, Inc. v. Municipal Court (1967) 66 Cal. 2d 893, where the city imposed a business license tax amounting to " '2% of the gross receipts attributable to the portion of the trip travelled within the city limits . . . by charter vehicles.' " We there said that "This method of allocation obviously works to confine the tax to that part of a licensee's revenue which is derived from intra-city business" (66 Cal. 2d at p. 896), to which we added in a footnote: "In so doing, it avoids discrimination against multi-city enterprise since it minimizes the risk of multiple taxation. (Cf., e.g., City of Los Angeles v. Belridge Oil Co. (1954) 42 Cal. 2d 823, 832 [271 P. 2d 5], app. dism. (1955) 348 U.S. 907 [99 L. Ed. 711, 75 S. Ct. 292]; Security Truck Line v. City of Monterey (1953) 117 Cal. App. 2d 441, 451-454 [256 P. 2d 366, 257 P. 2d 755], and cases there discussed.)" (66 Cal. 2d at p. 896, fn. 6.)

The foregoing review of the constellation of cases to which the Belridge decisions belong enables us to state with some confidence the principles which support and inform those decisions. In the first place, it is clear that in spite of the absence of a specific "commerce clause" in our state Constitution, other provisions in that Constitution - notably those

provisions forbidding extraterritorial application of laws and guaranteeing equal protection of the laws (see fns. 7 and 8, ante) - combine with the equal protection clause of the federal Constitution to proscribe local taxes which operate to unfairly discriminate against inter-city businesses by subjecting such businesses to a measure of taxation which is not fairly apportioned to the quantum of business actually done in the taxing jurisdiction. On the other hand, those constitutional principles do not prohibit local license taxes upon businesses "doing business" both within and outside the taxing jurisdiction; as long as such taxes are apportioned in a manner by which the measure of tax fairly reflects that proportion of the taxed activity which is actually carried on within the taxing jurisdiction; no constitutional objection appears. However, and conversely, no measure of apportionment can satisfy the constitutional standard if the measure of tax is made to depend upon a factor which bears no fair relationship to the proportion of the taxed activity actually taking place within the taxing jurisdiction.

We proceed to apply these principles to the case now before us.

III

The taxpayer Shell concedes that it is engaged in the business of "selling . . . goods . . . at wholesale" in the City of Los Angeles within the meaning of L. A. M. C. section 21.166 - and that it is therefore subject to a

business tax under the provisions of L. A. M. C. section 21.03. [12] The tax sought to be imposed on Shell pursuant to these sections is resisted in only one respect: Shell contends that the tax exceeds the City's constitutional powers and is in violation of the taxpayer's constitutional rights insofar as it is based upon the total gross receipts derived by Shell from wholesale sales of gasoline delivered from a point within the City to retailers located outside the City. We agree with this contention.

Ruling 14, upon which the City bases its attempt to include all of the questioned gross receipts in the measure of Shell's tax, essentially sets up a rigid distinction between, on the one hand, receipts derived from sales of goods which are shipped from or into the City, and on the other hand, receipts derived from sales of goods which are not shipped from or into the City. [13] Paragraph 1(c) of the Ruling, which deals with receipts in the former category, provides that all receipts from sales of goods "which are in any manner attributable" (italics added) to in-city business functions and which are shipped from or into the City "shall be considered directly attributable to

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12. The cited sections of L. A. M. C. are set forth in the text accompanying and immediately preceding footnote 2, ante.

13. Ruling 14 is discussed and set forth in relevant part in the text following footnote 4, ante.

the business engaged in within the City" - and therefore shall be included in the measure of the tax. [14] In contrast, paragraph 1(d) of the Ruling provides that if a taxpayer has receipts attributable to both in-city and out-of-city activities, and those receipts result from the sale of goods which are not shipped from or into the City, either 15 or 25 percent - according to the presence or absence in the City of certain specified elements of the selling process (see fn. 5, ante) - of those gross receipts shall be considered "directly attributable" and therefore properly included in the measure of the tax. [15] Thus, under the Ruling a taxpayer who has receipts "which are in any manner attributable" to in-city selling activities but which are also to some degree attributable to out-of-city selling activities will be taxed on 100 percent of those receipts if the goods whose sale produces them are shipped from or into the City, whereas he will be taxed on a maximum of 25 percent of those receipts if the goods are not shipped from or into the City.

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14. As we have explained above, our Belridge decisions held that receipts "directly attributable" to in-city activities were properly included within the measure of the tax.

15. In City of Los Angeles v. Moore Business Forms, Inc. (1966) 247 Cal.App.2d 353, an application of paragraph 1(d) was upheld against constitutional attack.

Most significantly, the aforesaid results will flow from the Ruling regardless of the proportion of selling activity which takes place within the City. If a particular receipt is "in any manner attributable" to in-city selling activities and if the goods are shipped from or into the City, the fact that a substantial portion of - or even the greater portion of - the selling activities which produced that receipt took place outside the City is of no moment: the entire receipt is included. On the other hand, if the goods are not shipped from or into the City, no more than 25 percent of the receipt is included in the tax base even if all but a small fraction of the selling activity which produced it takes place within the City.

We think it manifest that the apportionment formula set forth in Ruling 14 is capable of being applied in violation of the constitutional principles set forth in Belridge, and the other cases we have discussed. That formula, to the extent that it places decisive importance upon the situs of the goods at the time of shipment or delivery, rests upon a "purely accidental and extraneous event that has no relation to the taxable event occurring in [the City] or the quantum of business there carried on." (Security Truck Line v. City of Monterey, supra, 117 Cal. App. 2d 441, 454.) The "taxable event" here is the conduct of selling activities in the City by a business subject to taxation, and the formula of Ruling 14 depends on a factor which bears no rational relationship to the proportion of those activities which

actually takes place within the City. To the extent that the Ruling can be applied to include within the tax base the total gross receipts arising from sales which have resulted in part from any substantial out-of-city sales activity, it purports to reach gross receipts other than those "directly attributable to . . . selling activities carried on in the City" (City of Los Angeles v. Belridge Oil Co., supra, 48 Cal. 2d 320, 324) and is in violation of constitutional provisions forbidding extraterritorial application of local taxes and insuring equal protection under the law. (See fns. 7, 8, ante.)

It is clear, however, that a taxpayer who challenges an apportionment formula on constitutional grounds must show more than the possibility of erratic or unconstitutional application. "One who attacks a formula of apportionment carries a distinct burden of showing by 'clear and cogent evidence' that it results in extraterritorial values being taxed." (Butler Bros. v. McColgan, supra, 315 U.S. 501, 507, italics added; see also City of Los Angeles v. Moore Business Forms, Inc. (1966) 247 Cal. App. 2d 353, 362.) In the context of this case the taxpayer Shell has the burden of showing by "clear and cogent evidence" that the City's application of Ruling 14 to its business actually operates to include within its tax base total and undivided gross receipts from sales resulting in part from substantial out-of-city sales activity.

Shell has sustained its burden. At trial it presented substantial amounts of evidence detailing the functions of the out-of-city district offices contributing to the wholesale sale of gasoline to out-of-city dealers. [16] This evidence showed in essence that the district offices have primary responsibility for obtaining station sites (subject to approval by division, regional, or headquarters offices), constructing stations on approved sites, locating dealers to operate the stations, and "servicing" dealers within the district. While we think that the functions of the district office relating to the location and construction of new service stations are only indirectly related to the selling process, it is clear that certain functions performed in relation to setting up new dealers and "servicing" both new and old dealers are directly involved in that process. Thus, for example, the district office is responsible for binding dealers to purchase quotas through written sales agreements. Additionally, when a new dealership is created it is the district office which makes arrangements with the bulk terminal for the initial delivery and future supply of gasoline to the station. Payment problems concerning out-of-city dealers are also the responsibility of the district office.

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16. The trial court found as a fact that "the major part of the sales activity [relating to wholesale sales to out-of-city dealers] takes place in the City . . . ." The evidence which we now summarize is not inconsistent with this finding.

In addition to the functions of the district offices which are directly involved in the sales process, certain other aspects of that process take place outside the city. The actual delivery of the product of course occurs at the out-of-city station. Billing also occurs at this point, the driver of the delivery truck preparing an invoice according to the metered volume of gasoline actually delivered and handing it to the dealer. Furthermore, in certain circumstances - i.e., when a dealer because of a poor payment record or credit rating is on a "currency" rather than remittance basis - actual collection is made on a C.O.D. basis at the time of delivery.

It is clear from the foregoing that substantial elements of Shell's overall sales process relating to out-of-city dealers take place outside the City. [17] However, the City, applying

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17. We do not suggest that the out-of-city sales activities which we have mentioned are the only such activities which should be considered directly contributive to Shell's gross receipts. Nor do we evaluate the relative significance of the various factors. Such matters will be the proper concern of the trial court upon remand. We here determine only that if there are substantial out-of-city sales activities which directly contribute to the gross receipts sought to be made a basis of the tax, the measure of tax must apportion those gross receipts in a manner which fairly reflects the proportion of in-city to out-of-city activities. We express no present opinion as to which

(continued)

its Ruling 14, refuses to take cognizance of those out-of-city elements in the measure of its tax - and accordingly purports to tax the total gross receipts derived from the sales in question - solely because the goods are shipped from the City. Such an application of the Ruling is violative of the constitutional principles we have discussed because it renders the measure of tax dependent on a factor (i.e., the situs of the goods upon shipment) which bears no relationship to the proportion of the taxed activity (i.e., the business of selling) which actually takes place within the taxing jurisdiction and, under the facts of this case, operates to reach gross receipts other than those which are "directly attributable to . . . selling activities carried on in the City." (City of Los Angeles v. Belridge Oil Co., supra, 48 Cal. 2d 320, 324.)

Finally, we note our conclusion that the case of Carnation Co. v. City of Los Angles, supra, 65 Cal. 2d 36, whose legal effect in the instant context has been a subject of considerable argument among the parties, is, as Shell has maintained, not controlling in the determination of the instant case. Carnation holds that a business privilege tax levied on the business of "manufacturing and selling" (as opposed to merely "selling") under the

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17. Continued:

specific activities of Shell are to be considered sales activities for this purpose.

provisions of L. A. M. C. sections 21.166 and 21.167 is fundamentally a tax upon the privilege of manufacturing and that such a tax may constitutionally be based upon total gross receipts from sales, wherever made, of products wholly manufactured within the taxing jurisdiction. [18]

The judgment is reversed and the cause is remanded to the trial court with directions to set aside the findings of fact and conclusions of law; to determine a proper apportionment of defendant's gross receipts in conformity with the views herein expressed and, to that end, to receive such additional evidence as it may deem necessary or advisable; thereafter, having reexamined and redetermined all issues, to make and file findings of fact and conclusions of law in conformity with the views herein expressed; and to enter judgment accordingly.

SULLIVAN, J.

WE CONCUR:

TOBRINER, Acting C. J.
PETERS, J.
MOSK, J.

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18. Because the issue is not now before us we express no present opinion whether an apportionment of gross receipts is required in the case of products not wholly manufactured within the taxing jurisdiction.

COPY

CITY OF LOS ANGELES v. SHELL OIL CO.

L.A. 29670

CONCURRING OPINION BY BURKE, J.

The holding of the opinion in this case, as I read it, is that insofar as concerns the gross receipts from sales of gasoline delivered from Shell's in-city bulk terminal to locations outside the city, the city may not constitutionally assign as the controlling factor in fixing the measure of its tax on the business of "selling", the element of delivery from in the city to out of the city when substantial elements of the sales process to the out-of-city customers actually take place outside the city. Instead, a fair apportionment must be made as between in-city and out-of-city activities contributive to those gross receipts.

Although I agree with that ruling, it also seems to me that storage in the bulk plant in the city and delivery from that plant to out-of-city points are plainly factors to be taken into account and accorded their fair weight in making the apportionment. Based on my understanding that nothing in the opinion precludes considering the storage and delivery factors, I concur.

It also appears appropriate to note that if the city's code provisions undertook to cover businesses engaged in "handling and selling"; "storage, handling and selling"; "assembling and selling"; or "processing and selling," as well as (insofar as concerns Shell) merely "selling," then we would have a case more closely analogous to Carnation (Carnation Co. v. City of Los Angeles (1966) 65 Cal. 2d 36), in which the tax was levied on the business of "manufacturing and selling."

BURKE, J.

WE CONCUR:

MCCOMB, J.
*WOOD, J.

* Assigned by the Acting Chairman of the Judicial Council.

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IN THE

Supreme Court of the United States

October Term, 1970

No. ~~1859~~ 70-294

THE CITY OF LOS ANGELES, a municipal corporation,
Petitioner,

vs.

SHELL OIL COMPANY, a corporation,
Respondent.

Brief in Opposition to Petition for Writ of Certiorari.

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IN THE

Supreme Court of the United States

October Term, 1970
No. 1839

THE CITY OF LOS ANGELES, a municipal corporation,
Petitioner,

vs.

SHELL OIL COMPANY, a corporation,
Respondent.

Brief in Opposition to Petition for Writ of Certiorari.

Introduction.

Petitioner City of Los Angeles (City) imposes a business license tax on those engaging in business activities within its boundaries. The business activity in which Respondent Shell Oil Company (Shell) engages within the City is that of selling gasoline at wholesale. Although many of Shell's selling activities occur outside the City, the City has contended that it is entitled to measure the amount of its business license tax by 100% of the gross receipt of such sales if the gasoline was at any time within the City. Shell, on the other hand, has contended that due process requires the City to make a realistic apportionment between those gross receipts attributable to selling activities within the City and those attributable to selling activities outside the City and to measure its tax by only that portion of the receipts attributable to selling activities occurring within the City.

The California Supreme Court held that the Constitution of the State of California does require apportionment as contended by Shell and remanded this case to the Los Angeles Superior Court for further proceedings consistent with its opinion. (The opinion, which includes the relevant portions of the ordinances and administrative rulings involved, is appended to the Petition at A-1 to A-38.)

The California Supreme Court has spoken as the final authority on the construction of the California Constitution—the document to which the City owes its very existence—and has held that when the City choose[redacted]easure its tax by gross receipts arising from activities that take place in part within and in part without the City's boundaries the California Constitution requires the City to apportion "those gross receipts in a manner which fairly reflects the proportion of in-city to out-of-city activities." (A-34, ftn. 17.) Although the California Supreme Court's decision was presumably the last word on the City's powers pursuant to the California Constitution, the City petitions this Court claiming two questions are presented for determination. As Shell understands the City's claims, they are:

1. This Court has not only decided that state or local governments are permitted to tax events taking place outside their boundaries but that this Court has held such governments have a right to do so guaranteed by the United States Constitution and that the California Constitution cannot abridge such right.

2. The decision of the California Supreme Court permits Shell to escape paying its fair share of local taxes in violation of the City's right to due process of law.

Before considering these claims, we describe briefly the factual background of this lawsuit.

Factual Statement.

Shell refines gasoline at a refinery outside the City. The gasoline is delivered by clipper trucks to service stations throughout Southern California. The clipper trucks load gasoline either at the refinery outside the City or at a bulk plant in the City to which gasoline is transported by pipeline from the refinery. Transfer of title to the gasoline from Shell to the service station takes place at the point of delivery, the service station. The activities involved in selling the gasoline to the service stations are carried out at national headquarters in New York City, regional headquarters located in San Francisco, a divisional office in Los Angeles, and district offices located in Anaheim, Culver City, Long Beach, Pasadena, and San Bernardino, California. These selling activities include processing and accepting orders, arranging for delivery, and billing.

Deliveries to service stations in Southern California result in the following four taxable categories:

1. From the refinery outside Los Angeles to service stations in Los Angeles.
2. From the bulk plant in Los Angeles to service stations in Los Angeles.
3. From the refinery outside Los Angeles to service stations outside Los Angeles.
4. From the bulk plant in Los Angeles to service stations outside Los Angeles.

The only disputed category is the fourth category. Shell has conceded that all gross receipts of gasoline

sold to service stations within the City (categories 1 and 2) are to be reported for measurement of the business license tax. The City has conceded that gasoline sold from the refinery to the service stations outside the City (category 3) has so little connection with the City as to result in reporting only 15% of the gross receipts for measurement of the business license tax. However, the City has contended that the fact that the gasoline in the fourth category has been briefly within the City's limits entitles it to demand that 100% of the gross receipts on sales to service stations outside the City be included by Shell in the measurement of the City's business license tax. The City's contention was not accepted by the California Supreme Court.

The Questions Presented Are Without Merit.

1. The City, Having Chosen to Measure Its Tax by Events in Part Taking Place Outside the City, Is Required by Due Process to Apportion Its Tax. No Decision of This Court Has Ever Recognized That a Local Government Has a Constitutional Right to Tax Beyond Its Boundaries.

The decision of the California Supreme Court was correct and is entirely consistent with the holdings of this Court. *Norfolk & Western Ry. v. Missouri State Tax Commission,* 390 U.S. 317, 325 (1968), *National Bellas Hess, Inc. v. Department of Revenue of State of Illionois,* 386 U.S. 753 (1967), *Central Greyhound Lines, Inc. v. Mealey,* 334 U.S. 653 (1948), *Hans Rees' Sons, Inc. v. North Carolina,* 283 U.S. 123, 135-136 (1931). In the *Central Greyhound* case this Court, holding an unapportioned gross receipts tax in violation of the Commerce Clause, stated: "By its very nature an unapportioned gross receipts tax makes interstate transportation bear more than 'a fair share of the costs

of the local government whose protection it enjoys.'" 334 U.S. at 663. And, according to the *Bellas Hess* decision, the requirement of apportionment for Commerce Clause reasons and the "test for a state's compliance with the requirements of due process in this area are similar." 386 U.S. at 756.

In brief, the holdings of this Court are that due process requires apportionment of a tax is to be measured by events or activities beyond the taxing government's boundaries. The City cites two cases for its novel proposition that due process is a sword permitting it to tax or measure its tax by events or activities outside its boundaries rather than a shield protecting the taxpayer from such exactions. The cited cases are *General Motors Corp. v. Washington,* 377 U.S. 346 (1964), and *Norton Co. v. Department of Revenue of State of Illinois,* 340 U.S. 534 (1951). Neither of them supports the City's contention. In *Norton* Illinois was allowed to impose a tax on goods sold in Illinois by the taxpayer. Likewise in *General Motors* Washington was permitted to measure its tax by sales that had taken place within Washington. In neither *Norton* nor *General Motors* was the state attempting to tax sales, or to measure its tax by sales, which had taken place beyond its boundaries. As the California Supreme Court stated in a decision filed June 28, 1971, involving the very same City tax, *General Motors Corp. v. City of Los Angeles,* 5 Cal. 3d ...., at footnote 13:

> "In spite of our *Shell* decision [the decision the City here seeks to review] the City continues to rely upon *General Motors v. Washington* (1964) 377 U.S. 436 for the proposition that an unapportioned tax is proper in these circumstances. It

suffices to say that *Shell*, which was based primarily upon our interpretation of provisions of the state Constitution, is controlling in this state to the extent that its requirements of apportionment are more stringent than those approved in *General Motors v. Washington*."

2. The Decision Below Is Correct and Does Not Permit a Taxpayer to Escape Paying Its Fair Share of Local Taxes.

The City's statement (Petition, p. 14) that the decision of the California Supreme Court "divests the City of Los Angeles of its right to tax without due process of law" is an unintentionally correct statement of what the City was attempting to do until halted by the California Supreme Court. The City then goes on to suggest (Petition, p. 15) that Shell is now going to be able to "escape paying its fair share of local taxes . . ." Such a contention is contrary to the decision of the California Supreme Court which held that the City can impose taxes "as long as such taxes are apportioned in a manner by which the measure of tax fairly reflects that proportion of the taxed activity which is actually carried on within the taxing jurisdiction . . ." (A-28.)

The California Supreme Court has held that Shell is entitled to apportionment and remanded the case to the Los Angeles Superior Court for proceedings consistent with that decision. The City's contention that Shell will escape its fair share of the tax burden is without support in the decision it seeks to have reviewed. Furthermore, the City's Petition is not based upon a final judgment as required by 28 U.S.C. §1257. (The City erroneously states in its Petition that this Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254.) Because the issues of how apportionment is to be made

and what, it any, tax refund Shell is to receive have yet to be determined in the trial court and, perhaps, reviewed in California appellate courts, Shell submits that this case is not ripe for review and that there is no final judgment to bring before this Court. *Southern Pacific Co. v. Gileo*, 351 U.S. 493 (1956), *Washington ex rel. Gray's Harbor Logging Co. v. Coats-Fordney Logging Co.*, 243 U.S. 251 (1917).

Conclusion.

The City's Petition should be denied because the California Supreme Court has decided the City's taxing powers are limited as a matter of California constitutional law, its decision is entirely consistent with, not adverse to, the decisions of this Court, its decision does not permit Shell to escape its fair share of taxes, and is not, in that respect, final.

Respectfully submitted,

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